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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1028

LOUIS LESSER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In July, 1958, Lesser Industrial Properties Ltd. (Industrial), a partnership consisting of the taxpayers involved in this action, purchased a building located in Newport Beach, California, for a total price of approximately $2,700,000, and immediately leased it to Hughes Aircraft Company for 20 years, with options on Hughes' part to renew for an additional 30 years. The building was about one year old at the time. Its basic structure or shell, which was masonry and steel, with concrete floors, was "of a longlife nature, very permanent masonry type" with a useful life of up to sixty years (R. 18, 70). Other components of the building, such as painting, electrical work, plumbing, and air conditioning, had shorter

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useful lives and would require renewing or replacing prior to the end of the life of the building as a whole. Immediately after taking possession Hughes expended $5,000,000 in remodeling and expanding the building and converting it into a plant for the manufacture of semi-conductors, diodes and transistors (R. 22).

In computing depreciation on the building, Industrial used an estimated useful life of 25 years. Petitioners, as partners in Industrial, claimed *pro rata* shares of the depreciation deduction on their individual tax returns. The Commissioner disallowed part of the depreciation deductions on the ground that the building had an estimated useful life of 50 years. (R. 16–22, 32–37.) The Tax Court found that the useful life of the building was 45 years (R. 22, 37), and the court of appeals affirmed (Pet. App. 2).

The decision below is correct, there is no conflict of decisions, and the issue presented is not one of general importance.

1. This case involves the essentially factual determination of the useful life of a building for the purpose of computing the amount of depreciation allowable under § 167 of the Internal Revenue Code of 1954. The Tax Court, on the basis of the exhibits and testimony, found that the building in question had a useful life of 45 years, thereby rejecting both the petitioners' contention of a 25 year life and the Commissioner's determination of a 50 year life. The court of appeals, concluding that the Tax Court's findings were not clearly erroneous, affirmed. There is no compelling reason for this Court to review the

concurrent factual findings of the two lower courts. *Corn Products Co.* v. *Commissioner,* 350 U.S. 46, 51; *Comstock* v. *Group of Investors,* 335 U.S. 211, 214.

2. Moreover, the Tax Court's finding was clearly supported by the evidence. There is no dispute that in determining the useful life of a composite asset, such as a building, consideration should be given to the lives of its various component parts, with each part's relative weight based, in general, upon the taxpayer's cost basis for that component. Petitioners' own witness stated that the shell of the building here in question was of very durable construction and had a life of 40 to 60 years (R. 34, 70–71); the court found "that it was much closer to 60 years" (R. 34). The Tax Court also concluded that when the petitioners' witness testified that other components, such as electrical work, plumbing, ceilings, etc., had a life of 10 to 15 years, "he was shading it in petitioners' favor" (R. 34). Finally, the court concluded that, in reaching a composite estimated useful life for the building as a whole, the life of the shell was entitled to more weight than the life of the interior components, since petitioners expected much of the buildings' interior to be torn out as a part of the remodeling. It is well established that where a taxpayer purchases property with the intention of demolishing part of it, the consideration is allocated to the remainder of the property. See R. 36 and cases cited there. Therefore, the principal portion of the approximately $2,700,000 petitioners paid for the building would be allocated to the shell, and the Tax

Court was correct in giving the life of the shell more weight than the life of the interior.

3. Petitioners argue that although the original building as purchased by petitioners might have had a life of 45 years, the building as remodeled by the lessee had a substantially shorter useful life, *i.e.*, that the remodeling transformed the building into a "unique, single-purpose" structure which would become essentially unsalable and unusable at the end of "the basic 20-year term of the lease" (R. 33). Although petitioners contend that the Tax Court "failed to make any finding as to the character of the structure as remodeled" (Pet. 7), the Tax Court's opinion clearly shows that it rejected petitioners' contention that the remodeling made the building unsuitable for use before the end of its estimated 45 year physical life. After stating petitioner's argument on this point the Tax Court found as follows (R. 33):

> We are satisfied by the evidence that the property was not a unique, single-purpose building, and that the termination of the basic 20-year term of the Hughes lease would not put an end to its useful life, wholly apart from the six renewal options of five years each which contemplated further occupancy of up to 30 additional years by Hughes beyond the 20-year basic term. * * *

4. Petitioners' contentions that the instant decision conflicts with decisions of other courts of appeals are without merit. In *James Petroleum Corp.* v. *Commissioner,* 331 F. 2d 344 (C.A. 10), where the Tax Court had merely stated its ultimate conclusion with-

out making adequate supporting findings of fact, the court of appeals remanded for further findings. In the instant case, however, the Tax Court made ample findings. There is no basis for petitioners' contention that the Tax Court, when making a factual finding concerning the life of a depreciable asset made up of various components, must state the formula used in reaching its conclusion, showing a detailed break-down of the components and the estimated useful life of each. In an analogous fact finding situation, the determination of the value of property, the trial court is not required to state the formula used in reaching a conclusion based on all the evidence in the case.[1]

Nor is the decision below in conflict with *Anaheim Union Water Co.* v. *Commissioner,* 321 F. 2d 253 (C.A. 9); *J. H. Robinson Truck Lines* v. *Commissioner,* 183 F. 2d 739 (C.A. 5), or *Loesch & Green Const. Co.* v. *Commissioner,* 211 F. 2d 210 (C.A. 6), which held that "testimony which is unrebutted and unchallenged cannot be ignored" (Pet. 11). In the instant case, unlike the three cases cited, the Tax Court found that taxpayers' witness was "shading [his testimony] in petitioners' favor" (R. 34). This Court has held that the Tax Court may decline to accept expert testimony at face value. *Helvering* v. *Nat. Grocery Co.,* 304 U.S. 282, 295.

[1] In *Worcester County Trust Co.* v. *Commissioner,* 134 F. 2d 578, 581 (C.A. 1), the court of appeals merely held that the Board of Tax Appeals' determination was "without rational foundation." The Tax Court's decision in the instant case is, however, as the court of appeals found, supported by the record.

Finally, the decision below does not conflict with *Spinks Realty Co.* v. *Burnet,* 62 F. 2d 860 (C.A.D.C.). In that case the lessee, pursuant to a new lease, demolished a building which it had been renting and constructed a new one. The court held that the lessor must amortize his basis in the building over the period of the lease. That holding is in no way relevant to the instant case, where petitioners purchased and leased their building, not on the condition that it be demolished, but with the understanding that it be improved. The Tax Court found that the life of the building before and after remodeling was 45 years, and its decision is supported by the record.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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